United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7436

IN THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-7436

B

JOELLE FISHMAN, et al

Appellants

v.

GLORIA SCHAFFER, et al

Appellees

Appeal from the United States District Court for the District of Connecticut

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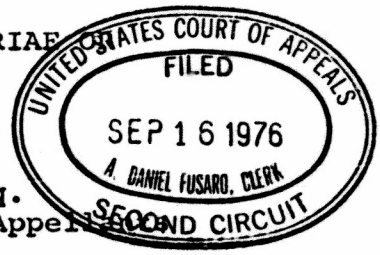
BRIEF FOR EUGENE McCARTHY, AS AMICUS CURIAE AND AS PARTY APPELLANT



Frank Cochran, Esq.
Attorney for the Appellants

Daniel Schaefer, Esq.
Assistant Attorney General
Connecticut
Attorney for State Official
Appellees

David Losee, Esq.
Attorney for the Local Official
Appellees

John C. Armor, Esq.
ARMOR & MARCUS, P.A.
Attorneys for Eugene McCarthy,
either Amicus Curiae or Appellant

BRIEF FOR EUGENE McCARTHY

Supreme Court Law on Point

The latest Supreme Court statement on independent access to the ballot is Storer v. Brown, (1974) 415 U.S. 724, 39 L.Ed.2d 714. Storer parallels the latest Supreme Court statement on minor party access to the ballot, which is American Party of Texas v. White, (1974) 415 U.S. 767, 39 L.Ed.2d 744.

Both of these cases, as well as all of the slip opinions enclosed, support two constitutional principles:

1. States may impose reasonable and makeable requirements to be met in order for independents or minor parties to achieve ballot position, thereby avoiding "cluttered ballots" and "voter confusion."

2. No state may make it either legally impossible, or practically impossible, for independents or minor parties to achieve a place on the ballot.

The issue is crystal clear that a prohibition of ballot access is unconstitutional. Yet it is true that as of 1 January 1976, fourteen states had such flat prohibitions against independents for president. Five such prohibitions are still in effect, but under attack.

Constitutional Law Applied to Connecticut

The issue becomes more difficult in Connecticut where there is, in theory at least, a route to the ballot by petition, available both to the Appellants and to Mr. McCarthy. The Court below is correct in finding that the restrictions that the Connecticut legislature has imposed must be shown to be "necessary to further a compelling state interest," and that they must be the "least burdensome method" of accomplishing the State's goal. American Party of Texas, supra, cited at slip opinion below, p. 13.

The Court below is also correct in finding that the requirement of the petitioners traveling to each of the jurisdictions of residence of signers of their petitions to swear to the signatures is not a less burdensome method of authenticating the signatures. Counsel for Mr. McCarthy can represent to this Court that no other state, or the District of Columbia has any such requirement. Only three states have the Texas requirement, approved in American Party of Texas, supra, that each signature be notarized. The balance of the jurisdictions have some form of oath, notarized or not,

made on the petition form by the petitioner.

The Court below, while concluding that the Connecticut restrictions would probably be unconstitutional if timely challenged, did not decide the case on the ground of laches. Counsel for McCarthy can represent to this Court that in none of the cases he has supervised has laches been raised as a defense, much less has it succeeded as a defense. We are dealing with basic constitutional rights, the violation of which are extremely rarely excused on grounds of laches. Counsel understands that Mr. Cochran will deal with this point in his Brief and argument.

Remedy if Law is Unconstitutional

If this court decides that the Connecticut statute is unconstitutional, the question becomes one of remedy. McCarthy draws this Court's attention first to the decision of the Oklahoma Supreme Court in McCarthy v. Slater, S.Ct. of Okla., case No. 49,899. The Court there found in a 6-2 decision, without dissenting opinion, that Oklahoma had not created a constitutionally acceptable route to the ballot for McCarthy, that this was a violation of the rights of the candidate, his electors, and his potential voters, and that the candidate had complied

with existing (and constitutional) law, and ordered him on the ballot. It further found that his candidacy in fact was a genuine and national one.

"Although one might challenge the possibility of success of the independent candidacy of McCarthy, it is difficult to challenge the seriousness of that effort. His supporting affidavit sets out his serious effort to win the presidency, his political experiences, and record, and the substantial number of states in which his independent candidacy will appear on the ballot." McCarthy v. Slater, supra, slip opinion, page 5.

In short, the legitimate state interest of Oklahoma was satisfied, that McCarthy is a serious candidate. And, obviously, states have no legitimate interest in choosing among candidates based on opinions of ultimate success. That decision rests with the sovereign people, and only them.

McCarthy draws the Court's attention secondly to the Massachusetts state-court decision McCarthy v. Guzzi, Superior Court of Massachusetts, Suffolk County, cases 15860, 15861. The Court there found that errors by local election boards had resulted in improper decertification of sufficient signatures to disqualify McCarthy, signatures which had to be added back in. It further found that the Secretary of State in Massachusetts, as in Connecticut, must simply accept the findings

of the local boards, without power of review or correction. It therefore found this pattern unconstitutional. Slip opinion, page 7. And the Court further found that denial of a position on the ballot to McCarthy was unconstitutional, and ordered it to be granted.

McCarthy v. Guzzi, supra, has been appealed to the Supreme Judicial Court of Massachusetts, however, the state has chosen not to request expedited hearing, nor a stay pending appeal.

While the thrust of the federal and state decisions supplied in slip opinions is the same, McCarthy understands that as a matter of deference, federal courts attempt to avoid deciding for a state how its own courts would interpret its laws. There is no opportunity for this kind of action in Connecticut; however, the state court decisions in Oklahoma and Massachusetts may be useful in indicating the kinds of remedies which states have applied to themselves, when faced with similar constitutional issues.

McCarthy will not review the other decisions which are attached. The one decision which might be argued for the state's position, and which counsel for McCarthy does not yet have in hand, is McCarthy v. Briscoe, U.S.D.C., Western District of Texas, Austin

Division, A-76-CA-158, which ruled 3-0 that Texas law was unconstitutional for providing absolutely no route to the ballot for an independent, but then denied relief on the grounds that McCarthy had done no petitioning whatsoever in Texas. (The lack of action was in accord with an opinion of the Secretary of State). This decision is now before Mr. Justice Powell on a Request for a Stay Pending Appeal.

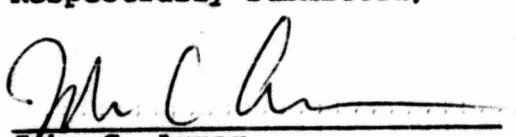
Mc Carthy believes that McCarthy v. Briscoe, supra, is distinguishable in that, like the Appellants, he has made all possible efforts to comply with Connecticut law, even if it is unconstitutional, whereas in Texas no effort was made.

Summary

McCarthy feels that the case law, especially the most recent cases in slip opinions, supports without exception the point that this Court should declare the Connecticut law unconstitutional with respect to the Appellants and McCarthy, and further unanimously supports the point that this Court should either find from the record that the Appellants have made all reasonable efforts to comply with Connecticut law, and should be ordered on the ballot, or in the alternative should remand to the lower

Court for factual findings on this point. In either case, McCarthy submits that this Court should remand the case to the District Court for McCarthy to intervene there, present evidence on his efforts to comply with the unconstitutional law, and be granted ballot position if the Court is satisfied that his is a legitimate candidacy for President, with community support in the State of Connecticut as well.

Respectfully submitted,



John C. Armor
Attorney for Eugene McCarthy
Amicus Curiae or
Party Appellant